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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 819

FRANKLINVILLE REALTY COMPANY, *Petitioner*,

vs.

ARNOLD CONSTRUCTION COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

T. J. BLACKWELL,
Counsel for Petitioner.

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Memorandum Concerning Records and Opinions of Lower Courts.

This was a non-jury case. After incomplete first trial, it was appealed and docketed as No. 9801, C. C. A. 5th Circuit (see *Franklinville* v. *Arnold,* 120 F. 2d 144). After remand and completion of the trial, a second appeal was taken and docketed as No. 10455, C. C. A. 5th Circuit. The second appeal was decided on January 20, 1943, but the opinion has not yet been reported.

The records used in the Circuit Court of Appeals have not been reprinted, but have been completed, as permitted by the rule, to make the record here.

So much of the record as was embraced in case No. 9801 (first appeal) will be referred to as "R."

So much of the record as was embraced in case No. 10455 (second appeal) will be referred to as "R. 2d."

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States Supreme Court, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This suit was originally brought in the Circuit Court of Palm Beach County, Florida, and removed to the United States District Court for the Southern District of Florida on the ground of diversity of citizenship. Arnold Construc-

tion Company, a Florida corporation, as a building contractor, sought foreclosure in equity of a lien on a partially completed dwelling house and swimming pool claimed under the provisions of Section 5396, Compiled General Laws of Florida, as against the Franklinville Realty Company, a Pennsylvania corporation, owner of the property and petitioner here.

A judgment was entered in the District Court granting the contractor such relief (R. 1146). On appeal the judgment was set aside (120 F. 2d 144). It was determined that the District Court had committed reversible error in holding certain architect's certificates final and conclusive, inasmuch as there was no provision in the building contract between the parties giving them that effect.

In that appeal, the United States Circuit Court of Appeals for the Fifth Circuit stated and held that: "The one point upon which *the case must be reversed* is the finding that the architect's certificates are final and conclusive as to the amount due for work done and materials furnished." But the said appellate court proceeded to decide and to adjudge that the foreclosure decree entered below should be and was *affirmed in part and reversed in part*, with a remand of the cause "for further proceedings limited to the presentation of evidence as to whether or not the labor and services listed in the certificates were actually used on the job," etc. The said opinion and decision was otherwise completely silent as to the defense of fraud and collusion relied upon by petitioner.

After the taking of additional testimony in the court below concerning the alleged indebtedness, and the making of a record for review under Rule 43 (c), judgment was again entered in favor of the contractor (R. 2d, 695). From that judgment, a second appeal to the United States Circuit Court of Appeals for the Fifth Circuit was taken. On that

appeal the judgment of the lower court was, on January 20, 1943, affirmed, upon a record disclosing the following.

By a letter dated March 19, 1937, the contractor (plaintiff) offered to construct the house according to plans and specifications prepared by Treanor and Fatio, architects, for a total fee of $3,000 above all reasonable costs involved, on a fair value basis, in the construction work (Plaintiff's Exh. 1; R. 921). On the same day the plaintiff submitted a bid to Treanor and Fatio, architects, for the construction of the building, in the total sum of $49,979 (Defendant's Exh. 7 for Iden., R. 990-991). In a letter dated March 24, 1937, the defendant accepted the plaintiff's offer to construct the building and pool for a total fee of $3,000 above all costs involved in the completion of the job. In its letter accepting the plaintiff's offer the defendant stated that a written contract would be entered into shortly between the parties (Plaintiff's Exh. 2; R. 922). A formal contract between the parties was later prepared and signed (R. 21).

From March 19, 1937, to July 19, 1937, the contractor performed work and furnished materials and labor towards the erection of the house. Petitioner ordered the contractor to cease work on the date last mentioned, in order to give its President an opportunity to examine reports forwarded to him (Plaintiff's Exh. 37; R. 946; R. 73-74). He had then been informed that the house and swimming pool (exclusive of a seawall and groyne), in the hands of Arnold Construction Company, would cost $90,000 (Plaintiff's Exh. 38; R. 947). It had not at any time prior thereto been intimated that such cost would exceed the original estimate or be in excess of the contemplated maximum of $50,000. It later developed that architect's certificates had been improvidently issued for $53,129.50, and that the building was about half finished. At that time petitioner had paid the contractor $30,500, that being enough to cover the work done on a reasonable cost and fair value basis. Peti-

tioner's refusal to pay the grossly excessive amounts demanded resulted in this suit.

The District Court permitted the architects, Treanor and Fatio, a partnership, to intervene in the foreclosure suit as plaintiffs (R. 115). After the first appeal and during the second trial, petitioner undertook to further cross-examine Frederick G. Seelman, a member of that partnership, who had initially been a witness for the contractor. The right to such cross-examination was denied (R. 2d, 554, 560). Petitioner then called both Frederick G. Seelman and Maurice Fatio, also a member of the firm of architects (R. 2d, 547, 636), as adverse parties, for cross-examination, pursuant to Rule 43 (b) of the Rules of Civil Procedure. The contractor's objections to such examinations were sustained and petitioner then made application for leave to cross-examine the named adverse witnesses, pursuant to Rule 43 (c) for the preservation of a record. This also was denied (R. 2d, 638, 639).

After the first appeal, wherein it was held that the architect's certificates were not conclusive, the petitioner amassed a large volume of evidence showing that the architect's certificates had been fraudulently and collusively issued to the contractor. However, the District Court expressly declined to consider such evidence and disregarded it entirely, holding that it was incumbent upon petitioner to disprove, item by item, the charges for labor and material represented by the said architect's certificates, without regard for the reasonable cost and fair value of the work as a whole. After permitting petitioner to offer relevant and competent proof sufficient to prove such fraud and collusion, the District Judge at the conclusion of such second trial ruled (R. 2d, 687) as follows:

> "I realize that defendant contends there was a lack of good faith on the part of Arnold Construction Company in the carrying out of the contract, and that the

> securing of the approval of work done through the issuance of architect's certificates *was a collusive proceeding* between Arnold Construction Company and the architect, but I think all of that has been decided by the Court of Appeals, *is not an open question*, and the District Court should not now go back through the contract and relitigate the alleged lack of good faith, and *retry* this issue. The District Court should consider whether the defendant has upset on this re-reference or rehearing the prima facie effect of the architect's certificates."

The contractor failed completely to produce any original payroll books kept on the job from day to day; completely failed to produce any delivery tickets showing the delivery of the materials charged for; and failed to produce as witnesses persons having knowledge of the facts reflected in its book entries. On the other hand, it was shown that the contractor was engaged in speculative building of homes for sale (R. 2d, 500, 510) while petitioner's job was under way, and that a person who did not purport to have knowledge of the matter directed that large disbursements for labor and material in the sum of $41,221.29 (R. 2d, 578-614) be charged against petitioner. The contractor's book entries, bill, invoices and receipts were otherwise unauthenticated and legal evidence of the alleged indebtedness was not produced, except to the extent that the architect's certificates can be considered as evidence.

Architect's certificates Nos. 6, 7, 8 and 9 were issued after the work was stopped and the contract terminated (R. 81-88). They were dated July 24, September 15, November 8 and November 9, 1937, and were for $4207.14, $2506.59, $1413.70 and $5883.50, respectively. Such certificates, issued after July 19, 1937, aggregated the sum of $14,010.93. Although the architects did not have the status of arbitrators, and were themselves charged with misconduct and

collusion, their certificates, so issued after the development of the controversy, and during the pendency thereof, were given the force and effect of evidence, and made conclusive against petitioner, in the absence of performance by petitioner of a manifest impossibility, i.e., disproving the contractor's claims for labor and materials, item by item.

In deciding the second appeal and in handing down the opinion herein dated January 20, 1943, the United States Circuit Court of Appeals for the Fifth Circuit passed over the questions of law presented under assignments of error founded upon exceptions to the Auditor's Report (R. 2d, 673-681) and neither affirmed nor denied that the record discloses that the District Court misinterpreted and incorrectly applied the appellate court's opinion and decision on the first appeal herein. The said appellate court declared that petitioner "was entitled and was permited to offer all relevant proof" and that the court "cannot say that the findings are so clearly wrong as to require a reversal". It neither affirmed nor denied that the admission of competent and highly important evidence for the express purpose of disregarding it is an illusory, futile and non-beneficial proceeding, not comporting with the essential requirements of due process of law.

II.

Jurisdictional Statement.

(1) The date of the final judgment to be reviewed is January 20, 1943 (R. 2d, 718). That judgment was rendered on a second appeal in this non-jury case. On the first appeal, decided June 3, 1941, the judgment below was "affirmed in part and reversed in part, and cause remanded for further proceedings in accordance with opinion". The two appeals were presented, successively, to the United States

Circuit Court of Appeals for the Fifth Circuit as its cases No. 9801 and No. 10455. The transcripts in the stated cases constitute the complete record here, without duplication.

(2) The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240, United States Judicial Code (U. S. C. A. Title 28, Section 347). That section provides in part as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

III.

Questions Presented.

The questions presented herein by the petitioner are as follows:

1. Did the District Court afford petitioner due process of law in denying petitioner's motion for leave to recall plaintiff's witnesses for further cross-examination, after the Circuit Court of Appeals had held that the architect's certificates were not final and conclusive and had remanded the case for further proceedings, full cross-examination prior to the appeal having been substantially precluded by the erroneous ruling of the District Court that the said certificates were final?

2. Is it necessary for the party cross-examining to give the trial court information as to the answers expected, in

order to take advantage in a Federal appellate court of the refusal of the trial court to permit proper cross-examination?

3. Was petitioner denied a substantial and essential right by the refusal of the District Court to permit petitioner to interrogate hostile and unwilling witnesses by leading questions, attempted to be put to the witnesses under Rule 43 (b) of the Rules of Civil Procedure?

4. Did the District Court during the rehearing act within the bounds of legitimate discretion, or on the other hand, in violation of an absolute right existing by virtue of Rules 43 (b) and 43 (c) in sustaining objections to petitioner's application for leave to cross-examine Maurice Fatio and Frederick G. Seelman, who were parties to the cause as intervening plaintiffs?

5. Does due process of law require that an equity case be determined on equitable principles or may an equity court, in a foreclosure case, give such weight to impeached and discredited architect's certificates, issued as self-serving declarations, as to establish the same as arbitrary mandates?

6. Where at the first non-jury trial it was capriciously and unreasonably held that architect's certificates were final and conclusive, and the defendant was thereby precluded from showing that said certificates were improperly and collusively issued, could the trial court, after appeal, reversal and remand, under the guise of giving such certificates prima facie effect, expressly disregard all evidence as to collusion between the contractor and the architects, on the ground that such collusion was "not an open question", without doing violence to the due process and equal protection clauses of the Constitution?

7. Where, under a "reasonable cost and fair value" building contract not providing that the architects shall be arbitrators or that their certificates shall be conclusive, a controversy arises resulting in the work being stopped and never completed and the architects and contractor being discharged, can certificates, grossly excessive in amount, issued to the contractor by such architects long after such stoppage and discharge, be given the effect of controlling evidence in a suit wherein the contractor and architects each seek to foreclose liens for services and materials, without manifest violation of the due process and equal protection clauses of the Constitution?

8. Did the Circuit Court of Appeals deny petitioner due process and equal protection of law by adjudicating on the first appeal that the cause should be remanded for "the presentation of evidence as to whether or not the labor and services listed in the certificates were actually used on the job", without requiring or permitting any proof as to the reasonable cost and fair value of the work, and in the absence of such proof of reasonable cost and fair value, by later deciding that the court could not "say that the findings are so clearly wrong as to require a reversal", on the second appeal?

9. Where the record discloses that incompetent evidence by way of ex post facto architect's certificates was received and given conclusive effect; that competent evidence in support of the judgment was not adduced; and that petitioner's evidence, after being nominally admitted, was expressly disregarded by the trier of the facts, was the "hearing" conducted in accordance with due process of law and was the judgment entered against petitioner not arbitrary or capricious, or in conflict with fundamental principles protecting private rights?

10. In a lien foreclosure case involving a cost plus contract containing a clause to the effect that the contractor recognizes that the owner has reposed a trust in him, thereby establishing a fiduciary relationship, can the controversy be resolved without regard for the question as to reasonable cost and fair value, on an arbitrary basis, without violation of the due process clause of the constitutional amendment?

11. Did the Circuit Court of Appeals in fact adjudicate on the first appeal that the contractor was entitled to recover, thereby settling all questions except as to the amount of the judgment subsequently to be entered below? If so, how was it then and there determined that the contractor had in fact earned more than the $30,500 which admittedly had been paid, the architect's certificates having been declared inconclusive and there being no other evidence of the alleged indebtedness? Was not such prejudgment, if actually made, a denial of due process of law?

12. Is the foreclosure of a mechanic's lien on Florida real estate, alleged to exist only by virtue of a statute of Florida, purely a local matter, in which the Federal courts should follow the decisions of the Supreme Court of Florida?

IV.

Reasons Relied On for the Allowance of the Writ.

1. The Circuit Court of Appeals for the Fifth Circuit has rendered in this case, on successive appeals, decisions that are conflicting and that have been so applied as to deprive petitioner of due process of law required by the Fifth Amendment to the Constitution of the United States, as follows: (a) It was decided on the first appeal that the judgment of the District Court must be reversed for holding that the architect's certificates were final and conclusive; (b) that nevertheless the judgment then entered in said

appellate court was not in conformity with the said decision, the judgment being that the foreclosure decree entered below should be and was affirmed in part and reversed in part, whereas absolute reversal for fundamental error was required; and (c) yet there was a further holding on the second appeal herein, by the same Court, that its original decision, on the first appeal, was in fact an affirmance, rather than a reversal.

2. The Circuit Court of Appeals for the Fifth Circuit denied the petitioner due process of law in affirming, on the second appeal, a decree of foreclosure made in the District Court without more than a mere colorable and illusory hearing as to the merits of the controversy, and entered upon the District Court's stated belief that the matter in controversy, i.e., fraud and collusion between the architects and the contractor as to issuance of architect's certificates, was "not an open question", under the prior decision, on the former appeal.

The several decisions and judgments of the United States District Court for the Southern District of Florida and of the United States Circuit Court of Appeals for the Fifth Circuit were so worded, interpreted, construed, arranged and applied at different stages of the proceedings that this petitioner has been denied a right usually accorded other litigants; that is to say, the right to present competent and preponderating evidence as to the merits of the matter in litigation, under such circumstances and under such conditions that the litigant may rightly assume that such competent evidence will not only be admitted, nominally, but that it will be weighed and its probative effect considered and determined. In expressly declining to so weigh and consider the evidence in this cause the District Court denied petitioner due process of law, such as is required by the Fifth Amendment to the Constitution of the United States, and the said Court thereby proceeded in an unreasonable

and capricious manner, so as to deprive petitioner of property on a basis coming close to the boundary of arbitrary action.

3. The Circuit Court of Appeals for the Fifth Circuit abdicated its function to review and correct errors of the lower court, on the second appeal, in declaring that it "cannot say that the findings are so clearly wrong as to require a reversal", when the findings of the lower court neither contained nor purported to contain an adjudication that the amount of the decree for the foreclosure of the mechanic's lien represented the reasonable costs of the work done and materials furnished, on a fair value basis; and neither contained nor purported to contain any finding that the architects and contractor were free from fraud and collusion. And the said appellate court thereby denied petitioner due process of law, in failing to observe and to correct gross and obvious error, such as will or may result in an unconstitutional taking of petitioner's property.

4. In holding that architect's certificates issued after the severance of relations between the parties, and after termination of the contract and during the pendency of a controversy between the owner on one side and the contractor and the architects on the other, made out a prima facie case for the contractor, notwithstanding evidence of fraud and collusion which the court declined to consider, petitioner, as such owner, was denied due process and equal protection of law, to-wit:

(a) The architect's certificates were thereby made fetishes, and granted sacrosanct status, as creating a presumption against petitioner, though the said presumption was based neither on common experience nor common sense.

(b) The stated presumption was, by the court's decisions, permitted to stand as final and conclusive, unless rebutted on a basis not reasonably within human accom-

plishment. They were given the force and effect of juridical determinations of the matter of the alleged indebtedness. The architects were thereby made the judges in their own cause, i.e., a cause in which they intervened as plaintiffs and as petitioner's adversaries.

(c) The fact that said certificates were issued by a clerical employee of the architects, without the determination or attempted determination of any question as to reasonable value and fair market price, was disregarded.

(d) Under the circumstances and conditions of this case, a judicial fiat was unreasonably allowed to take the place of evidence; a mere assertion, by way of purported opinion and conclusion, and represented by so-called certificates issued during the pendency of a controversy, has been allowed to create a presumption that is wholly arbitrary, and petitioner has been denied a fair opportunity to repel such presumption.

5. The Circuit Court of Appeals for the Fifth Circuit has rendered in this case a decision concerning the enforcement of the Uniform Mechanics' Lien Act, Chapter 17097, 1935 Florida Laws (Compiled General Laws of Florida, Permanent Supplement, Volume 4, Section 5396, Sub-sections 1 to 35, inclusive), and has interpreted and applied the said Act in a manner conflicting with the decisions of the Supreme Court of Florida, in the cases of *Langford* v. *Read,* 69 Fla. 198, 68 So. 723, 726; *Alsheimer* v. *Palmer,* 119 Fla. 335, 161 So. 559; and *G. A. Chapman* v. *St. Stephens Protestant Episcopal Church, Inc., and the Trustees of the Diocese of South Florida,* 10 So. (2d) 324 (Advance Sheets), requiring clear and conclusive proof in regard to the establishment and enforcement of mechanics' liens through decree for foreclosure, in equity.

6. Maurice Fatio and Frederick G. Seelman, members of the partnership of Treanor and Fatio, architects, who in-

tervened in this case as plaintiffs, were and are adverse parties, and as such were subject to cross-examination, particularly pursuant to Rule 43 (b) and Rule 43 (c) of the Rules of Civil Procedure, as a matter of right, and not merely in the discretion of the lower court. In holding that the District Court committed no error in precluding petitioner's cross-examination of said witnesses, pursuant to Rule 43 (b) and Rule 43 (c), as aforesaid, the Circuit Court of Appeals for the Fifth Circuit has denied petitioner due process of law, and has thereby rendered in this case a decision on a question of general importance in a manner that appears to be in conflict with the weight of authority. The question in that regard, under the Rules of Civil Procedure, is one of importance that ought to be settled by the United States Supreme Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 9801 and No. 10455, Franklinville Realty Company, Appellant *v.* Arnold Construction Company, Appellee, to the end that the said cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgments herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as this Court may deem proper.

Dated this 6th day of March, 1943.

T. J. BLACKWELL,
Counsel for Petitioner.

BRIEF.

A. Cross-examination of Adverse Parties and Witnesses Was a Matter of Right.

In an appendix hereto, we have reproduced the record of the colloquy between the court and counsel, with pertinent parts of the interrogations, to demonstrate that petitioner's questions numbered 1 to 4, as set forth in the petition, are substantial in character and are fully supported by the transcript. For the sake of brevity, the questions will not be repeated here, and extensive record citations will be omitted.

As full cross-examination of the plaintiff's witnesses had been substantially precluded by the erroneous ruling of the District Court that the architect's certificates were final, prior to the first appeal, petitioner was prejudiced by the curtailment of the cross-examination of such witnesses at the second hearing, and the opinion of the Circuit Court of Appeals in this connection is in direct conflict with prior decisions of other Circuit Courts of Appeal and of the Supreme Court, and is against the weight of authority.

Furlong v. *United States* (C. C. A. 8th), 10 F. (2d) 492;
Farkas v. *United States* (C. C. A. 6th), 2 F. (2d) 644;
Hale v. *Henkel,* 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652, 662;
Alford v. *United States,* 282 U. S. 687, 51 S. Ct. 218, 75 L. Ed. 624.

In the case last cited, the Supreme Court, speaking through the present Chief Justice, said:

> "Cross-examination of a witness is a matter of right. The Ottawa, 3 Wall. 268, 271, 18 L. ed. 165, 167. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his

reputation for veracity in his own neighborhood (cf. Khan *v.* Zemansky, 59 Cal. App. 324, 327ff., 210 Pac. 529; 3 Wigmore, Ev. 2d ed. section 1368, I (1) (b); that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment (Kirschner *v.* State, 9 Wis. 140; Wilbur *v.* Flood, 16 Mich. 40, 93 Am. Dec. 203; (692) Hollingsworth *v.* State, 53 Ark. 387, 14 S. W. 41; People *v.* White, 251 Ill. 67, 72ff., 95 N. E. 1036; Wallace *v.* State, 41 Fla. 547, 574ff., 26 So. 713); and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased (Tla-Koo-Yel-Lee *v.* United States, 167 U. S. 274, 42 L. ed. 166, 17 S. Ct. 855; King *v.* United States, 50 C. C. A. 647, 112 Fed. 988; Farkas *v.* United States (C. C. A. 6th), 2 F. (2d) 644; see Furlong *v.* United States (C. C. A. 8th), 10 F. (2d) 492, 494).

"Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. Knapp *v.* Wing, 72 Vt. 334, 340, 47 Atl. 1075; Martin *v.* Elden, 32 Ohio St. 282, 289. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. Tla-Koo-Yel-Lee *v.* United States, 167 U. S. 274, 42 L. ed. 166, 17 S. Ct. 855, supra; King *v.* United States, 50 C. C. A. 647, 112 Fed. 988, supra; People *v.* Moore, 96 App. Div. 56, 89 N. Y. Supp. 83, affirmed without opinion in 181 N. Y. 524, 73 N. E. 1129; cf. People *v.* Becker, 210 N. Y. 274, 104 N. E. 396. *To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial*

*right and withdraw one of the safeguards essential to a fair trial. * * *.*"

The denial of petitioner's application for leave to recall plaintiff's witnesses for further cross-examination, after the remand, was not based on the rule that "a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination." Rather, the District Judge mistakenly believed that the question as to "collusion" between the intervening architects and the contractor-plaintiff "was not open", and was unwilling to permit cross-examination to disclose such collusion. Due process of law was thereby denied.

Prior to the first appeal, Frederick G. Seelman, (member of the architectural firm of Treanor & Fatio, and an intervening plaintiff), had been a witness for the contractor. Petitioner made application, after the remand, for leave to recall him for further cross-examination, along with plaintiff's other witnesses, (R. 2d, 39) without success, as above indicated.

Accordingly, during a subsequent hearing, petitioner invoked Rule 43 (b) of the Rules of Civil Procedure and attempted to examine the said Seelman (R. 2d, 554, 640), and also Maurice Fatio, another member of the firm of the intervening plaintiffs (R. 2d, 547, 636). The District Judge refused to permit such examination, and also denied petitioner's application for leave to make a record of the testimony of these witnesses pursuant to Rule 43 (c), (R. 2d, 636, 638, 639, 640), as is more fully shown in the appendix hereto.

The Circuit Court of Appeals held that the stated rulings were within the discretion of the lower court. It is submitted, however, that the express provisions of the rules confer absolute rights, within which petitioner's motions

and attempted cross-examination came, and that the stated interpretation and application of the cited rules denied petitioner due process herein.

At one point in the proceedings, (as shown in the appendix), the District Judge ruled that Seelman and Fatio were privileged to refuse to answer petitioner's questions because their answers might expose them to civil liability to petitioner in a pending action. That ruling was contrary to the established rule. See 70 C. J., page 742, Section 896, and Jones on Evidence (2d Edition), Vol. 6, page 4909, Section 2480. It was purely abritrary.

Arbitrary discrimination is not due process. *Wallace, Secy. of Agriculture,* v. *Currin,* 95 F. (2d) 856.

If a party is deprived of any substantial right that is usually accorded others, he is denied due process. *Riglander* v. *Star Co.,* 90 N. Y. S. 772.

The right to an adequate cross-examination, and a fair opportunity to subject an adverse witness to this "great and ordinary test of truth" is guaranteed by the due process clause of the Constitution. In re *Megger's Estate,* 278 N. Y. S. 669.

It is respectfully submitted that the Court should grant certiorari to settle the above stated important questions of practice under the Rules of Civil Procedure.

B. An Arbitrary Final Decision Not Purporting to Be Founded on a Consideration of All the Competent Evidence Is Not Due Process.

Reference is made to the fifth, sixth, eighth, ninth and tenth questions, as stated in the petition herein. It appears unnecessary to elaborate on the stated questions at this point, but we wish to again call the Court's attention to the excerpt from the opinion of the District Judge (R. 2d, 687), as quoted in the "Summary Statement of the Matter

Involved", to the effect that the matter of collusion between the architects and the contractor was not considered an open question.

It has been said that "there is no place in our constitutional system for the exercise of arbitrary power", and it has been many times declared that "a competent and impartial tribunal is required by the due process clause". Before the Fourteenth Amendment to the Constitution was adopted, the Supreme Court had stated that it was a "great fundamental rule in the administration of justice * * * that everyone shall have an opportunity of defending his rights before judgment is pronounced against him". *Smith* v. *McCann,* 24 How. 389, 407; 15 L. Ed. 714.

A trial by a biased judge is not in conformity with "due process of law". *National Labor Relations Board* v. *Ford,* 114 F. (2d) 905; certiorari denied 312 U. S. 689, 61 S. Ct. 621, 85 L. Ed. 1126.

The term "bias" is commonly defined judicially as "a predisposition to decide a cause or an issue in a certain way". It is also said to exist when the developments have been such as "not to leave the mind perfectly open to conviction". Manifestly, bias can be created, within such interpretations of the term, by a misconception or misunderstanding as to the issues presented, and as to the burden of proof. And when such bias exists in the trial of such a case as the one at bar, an arbitrary judgment is necessarily brought about.

It has often been stated that fundamental rights of a defendant shall not be so taken from him arbitrarily, or without the right to be heard according to the usual course of law, in such cases as this.

Frank v. *Mangum,* 237 U. S. 309, 334; 35 S. Ct. 582; 59 L. Ed. 969;

Garland v. *Washington,* 232 U. S. 642; 34 S. Ct. 456; 58 L. Ed. 772;

Rogers v. *Peck,* 199 U. S. 425, 435; 26 S. Ct. 87; 50 L. Ed. 256.

The arbitrary refusal to hear a party by counsel (or to consider his evidence) would be a denial of a hearing, and therefore a denial of due process in a constitutional sense.

Powell v. *Alabama,* 287 U. S. 45, 68-69; 53 S. Ct. 55; 77 L. Ed. 158; 84 A. L. R. 527;
Felts v. *Murphy,* 201 U. S. 123, 129; 26 S. Ct. 366; 50 L. Ed. 689;
Kelley v. *Oregon,* 273 U. S. 589, 591; 47 S. Ct. 504; 71 L. Ed. 790.

A legislative (or judicial) presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense, so as to obtain a decision actually based on such facts.

Bandini Petroleum Co. v. *Superior Court,* 284 U. S. 8, 18; 52 S. Ct. 103; 76 L. Ed. 136;
Mobile, J. & K. C. R. Co. v. *Turnipseed,* 219 U. S. 35, 42; 31 S. Ct. 136; 55 L. Ed. 78;
Western & A. R. Co. v. *Henderson,* 279 U. S. 639, 642; 49 S. Ct. 445; 73 L. Ed. 884.

The word "hearing", in the sense of a judicial or quasi judicial proceeding, means the trial of an issue, including the introduction of evidence, the argument, the consideration by the court, and the final decree or order. *Equitable Life Insurance Co. of Iowa* v. *McNamara* (Iowa), 278 N. W. 910, 913.

The "hearing" contemplated by Section 1 of the Railway Labor Act (45 U. S. C. A. 151) is a judicial proceeding in which evidence is received and *weighed* by the trier of the facts. *Shields* v. *Utah, Idaho Cent. R. Co.,* 305 U. S. 177, 59 S. Ct. 160, 83 L. Ed. 111. There, Chief Justice Hughes, speaking for the Court, said:

"In considering the effect of the Commission's determination, the fundamental question is the intent of Congress. The language of the provision points to definite action. The Commission is to '*determine.*' The Commission must determine '*after hearing.*' The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.' The 'hearing' is 'the hearing of evidence and argument.' Morgan *v.* United States, 298 U. S. 468, 480, 80 L. ed. 1288, 1294, 56 S. Ct. 906. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. Interstate Commerce Commission *v.* Louisville & N. R. Co., 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 S. Ct. 185. * * *"

Where it was sought to restrain the enforcement of an order of the Secretary of Agriculture fixing rates for stockyard services, allegations that the Secretary made the rate order without having heard or read the evidence, without having heard oral arguments, or having read or considered briefs, were improperly stricken, since to constitute a "hearing", to meet the requirements of due process of law, the officer making the decision must consider and appraise the evidence. *Morgan* v. *United States,* 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288; Id., 304 U. S. 1, 58 S. Ct. 773, 999, 82 L. Ed. 1129. (See also *Consolidated Edison Company* v. *National Labor Relations Board,* 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126.)

In *Crowell* v. *Benson,* 285 U. S. 22, 60, 61, 52 S. Ct. 285, 76 L. Ed. 598, 617, 618, Chief Justice Hughes, speaking for a majority of the Court, said:

"In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions,

> both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to '*a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts.*' Ohio Valley Water Co. *v.* Ben Avon, 253 U. S. 287, 64 L. ed. 908, P.U.R. 1920E, 814, 40 S. Ct. 527, supra. See also Prendergast *v.* New York Teleph. Co., 262 U. S. 43, 50, 67 L. ed. 853, 858, 43 S. Ct. 466; Tagg Bros. & Moorhead *v.* United States, 280 U. S. 420, 74 L. ed. 524, 50 S. Ct. 220, supra; Phillips *v.* Commissioner of Internal Revenue, 283 U. S. 589, 600, 75 L. ed. 1289, 1299, 51 S. Ct. 608. * * *"

The right under the due process clause to a full hearing includes not only the right to introduce evidence, but also to have judicial findings based upon the evidence. *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 56 S. Ct. 797, 80 L. Ed. 1209, 1224. The Court there said:

> "The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it."

In the case of *Georgia R. & Electric Co.* v. *Decatur,* 295 U. S. 165, 55 S. Ct. 701, 79 L. Ed. 1365, it was held that the refusal of a state court to receive or consider evidence of lack of benefits to a street railway company which was required by a municipal ordinance to pay the cost of street paving, on the ground that such evidence was immaterial, amounted to a denial of a hearing on that issue, in violation of the due process clause of the Federal Constitution, where the statute authorizing the ordinance directing the assessment for the cost of such improvements, as construed by the state courts, required, as the basis of their operation,

the existence of benefits. There, speaking for a majority of the Court, Mr. Justice Sutherland said:

> "No question is raised as to the competency of the proof which was offered, and evidently there is none. The ruling was simply that it was immaterial. But the existence of benefits resulting from the improvement was material and was deemed so—else why require it, or why create an affirmative presumption in respect of it? Certainly, competent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; and the refusal of a court to receive *or consider* any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution. Saunders *v.* Shaw, 244 U. S. 317, 319, 61 L. ed. 1163, 1165, 37 S. Ct. 638; Bandini Petroleum Co. *v.* Superior Ct. 284 U. S. 8, 19, 76 L. ed. 136, 144, 52 S. Ct. 103, 78 A. L. R. 826; Western & A. R. Co. *v.* Henderson, 279 U. S. 639, 642, 73 L. ed. 884, 887, 49 S. Ct. 445; Zeigler *v.* South & North Ala. R. Co., 58 Ala. 594, 599. Compare Norwood *v.* Baker, 172 U. S. 269, 278, 279, 43 L. ed. 443, 447, 19 S. Ct. 187; Road Improv. Dist. *v.* Missouri P. R. Co., 274 U. S. 188, 71 L. ed. 992, 47 S. Ct. 563; Standard Pipe Line Co. *v.* Miller County Highway Bridge Dist., 277 U. S. 160, 72 L. ed. 831, 48 S. Ct. 441, 58 A. L. R. 126."

A close examination of the judgments of the Circuit Court of Appeals in the light of its two opinions written on the successive appeals will show clearly and unquestionably that the architect's certificates were allowed to have and were given conclusive effect, notwithstanding declarations at times made both in that court and below that they were prima facie only.

The architect's certificates had no quality of an adjudication. They depended for finality on their inherent accuracy, if any. To test whether they were accurate or not, they were subject to being met by any competent proof. Evidence

that the certificates were in no sense accurate, and that they were collusively issued, was expressly disregarded, and petitioner was thereby denied a fair hearing.

C. The Architects Should Not Have Been Accorded the Status of Judges in Their Own Cause.

The record speaks of conflicting judicial views as to what was in fact decided on the first appeal, as indicated by petitioner's seventh and eleventh questions herein.

In its last decision, on the second appeal, the Circuit Court of Appeals, in effect, declared that it had been decided that the architect's certificates, whether issued before or after discharge of the architects, were conclusive to the extent of showing that the plaintiff-contractor was entitled to have judgment against petitioner, and were otherwise conclusive on all points except as to whether the materials and labor charged for actually went into the job, and that as to the latter, the burden of proof was on petitioner.

Not only were the architects so made arbitrators by judicial decree (and not by the contract of the parties), but they were made judges in their own cause; in a cause in which they had intervened and in which they were then before the court as plaintiffs.

In this connection, we refer to Cooley's Constitutional Limitations (Seventh Ed.), pp. 592, 593, 594, as follows:

> "There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturae sunt immutabilia*, and they are *leges legum*.'
>
> "This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are in-

terested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause. * * *

"Accordingly, where the Lord Chancellor, who was a shareholder in a company in whose favor the Vice-Chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree on this ground, Lord Campbell observing: 'It is of the last importance that the maxim that "no man is to be a judge in his own cause" should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.' 'We have again and again set aside proceedings in inferior tribunals, because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals, when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence.'

* * * * * * *

"'* * * To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly."

The architects should not have been allowed to serve as judges or as arbitrators to the extent of permitting their

certificates to over-ride the rule alluded to in *Primeau* v. *Granfield,* (2 Cir.), 193 F. 911, 913, as follows:

> "When fraud or illegality is disclosed in a case, public policy requires a court to refuse its aid *irrespective of the state of the pleadings* and regardless of the fact that with fraud and illegality absent the plaintiff might appear entitled to relief. McMullen *v.* Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Memphis Keely Inst. *v.* Leslie E. Keeley Co., 155 Fed. 964, 84 C. C. A. 112, 16 L. R. A. (N. S.) 921; Teoli *v.* Nardolillo, 23 R. I. 87, 49 Atl. 489; Drake *v.* Lauer, 93 App. Div. 86, 86 N. Y. Supp. 986."

Regardless of the weight given the architect's certificates in this case, the District Court denied petitioner due process of law in holding that the question of collusion "was not open".

D. The Decisions of the Courts Below Are in Conflict With the Decisions of the Highest Court of Florida.

Reference is made to petitioner's twelfth question, and to the authorities cited in section 5 of the "Reasons Relied on for the Allowance of the Writ". For the sake of brevity, the citations of the Florida cases will not be here repeated.

It has always been held by the Supreme Court of Florida that the foreclosure of a mechanic's lien, under the Florida statute, is purely and simply an equitable proceeding; that the plaintiff in such a suit must come into the equity court with clean hands; that he must prove his claim by clear and convincing evidence, and that insofar as "cost plus" contracts are concerned, he does not make out a case by unsupported book entries and unauthenticated invoices and material bills.

The decisions of the District Court and of the United States Circuit Court of Appeals for the Fifth Circuit in the case at bar are in conflict with the stated Florida rules.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, wherein the judgment of the United States District Court for the Southern District of Florida was affirmed.

Respectfully submitted,

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APPENDIX.

In order to show the proceedings in the District Court, after the first appeal which resulted in a reversal and remand, with respect to the denial of the petitioner's right to cross-examine adverse parties and witnesses, all pertinent portions of the record, with respect to the attempted cross-examination, are here reproduced, as follows:

(References are to the record on the second appeal, Case No. 10455, designated R. 2d).

Pages 39-40:

"Mr. Blackwell (Attorney for petitioner-defendant-owner):

The defendant moves the Court for leave at this time to recall witnesses of the plaintiff for further cross examination, in view of the holding of the Master at prior hearings, that the architect's certificates were concluded,—the defendant hereby making application for leave to recall plaintiff's witnesses for the purpose of re-cross examining them as to the quantity, amount and reasonable value of all items of labor and material that has gone into the job or is proper to have been incorporated in the job, and as to all materials that are purported to have been specially fabricated, as to all purported subcontractors.

Mr. Lake (Attorney for Arnold Construction Company, plaintiff-contractor):

To which motion the plaintiff objects on the ground that the motion is too broad and does not specify any particular witness; secondly, on the ground that at the prior trial of this case no witness, other than J. W. Arnold, was precluded from being further cross-examined on account of the Master's ruling.

The Court:

The motion is denied, except as to J. Y. Arnold, who will be allowed to be cross-examined as a recalled witness. This ruling, however, is not to interfere with the right of the

defendant to go into the matter as combating the prima facie effect of the matters already indicated by the Court.

Mr. Blackwell:

The defendant moves the Court for clarification of the ruling just made with respect to Rule 43-B in regard to calling for cross-examination any adverse party, or officer or director or managing agent or member of a partnership.

The Court:

Outside of Mr. J. Y. Arnold you can call any witnesses you want to, but you make them your witnesses. The line is laid down according to what I have already ruled, and you must adhere to that ruling.

Mr. Blackwell:

Will your Honor rule that the ruling that has just been made in connection with the cross-examination of adverse witnesses will not preclude us from resorting to Rule B to any extent that it may be applicable?

The Court:

You bring your witnesses on. I do not care to make any ruling in regard to what I am going to allow on cross-examination until the witnesses come on. I do not care to make any ruling in advance, however, I am not going to deprive you of any rights you have under the rules.

Pages 545-547:

Mr. Blackwell:

The defendant now desires to call Mr. Maurice Fatio under Rule 43B as an adverse witness for cross-examination, Mr. Fatio having intervened in this case as a member of the firm of Treanor & Fatio, the architects, and has pending here a claim against this defendant growing out of the same transaction.

Mr. Lake:

To which the plaintiff objects, your Honor, on the ground that Mr. Fatio has heretofore been called to testify in this

case and has heretofore been cross-examined, and your Honor, in his ruling at the opening of this case on the second trial, ruled that nobody could be recalled for cross examination except Mr. J. Y. Arnold; secondly, on the ground that Mr. Fatio is not now a party to this case, a severance having been granted in his intervention.

The Court:

I rule that the defendant may call Mr. Fatio under the allegation made as an unwilling or hostile witness, but as an adverse I rule that he is not an adverse party as against Arnold Construction Company, so I think the extended right of examination extends to the propounding of leading questions, but not to impeach him, and rules on the offer by the defendant to examine Mr. Fatio under Rule 43B,—the ruling being that the assertion of the defendant's counsel that Mr. Fatio is an unwilling or hostile witness is recognized as a basis for ruling that the examination may proceed by asking him leading questions. The Court understands that the defendant likewise claims the right to examine Mr. Fatio as a member of the partnership of Treanor & Fatio as an adverse party.

The Court is of the opinion that since we are hearing evidence at this time on the claim of Arnold Construction Company, that the claim of Treanor and Fatio as an intervener is not being heard. The merits of the intervention are not before the Court at this time and, as I understand, Mr. Blackwell is not seeking to examine Mr. Fatio with regard to the merits of the intervention, but solely in regard to the merits of the claim of Arnold Construction Company. For that reason the Court is of the opinion that the witness Fatio, insofar as the claim of Arnold Construction Company is concerned, is not the claim of an adverse party, and therefore the right to seek to impeach the witness is denied.

Mr. Blackwell:

Now I would like to have the record show a motion on behalf of the defendant Franklinville Realty Company to strike the petition for intervention, the order permitting

the intervention and all proceedings incident to the intervention of Treanor and Fatio as adverse parties to the Franklinville Realty Company in this connection, in this action.

The Court:

That is denied.

Mr. Blackwell:

The defendant, in view of the Court's ruling, and being unwilling to examine this witness under such circumstances as to be bound by his testimony, and being unwilling to proceed and examine the witness under any condition except as an adverse witness under Rule 43B, nevertheless proffered to proceed to examine the witness for the purpose of making a record pursuant to rule 43C, which rule places upon the party in a case tried without a jury the privilege of putting in evidence the testimony upon which he will rely, and although the Trial Court may disregard the testimony, it is nevertheless proper under the rule, as we understand it, to have it brought out for the record and for further proceedings in the case.

The Court:

Do I understand, Mr. Blackwell, that under the last sentence of Rule 43C, you are requesting the Court to grant you the privilege of developing your proffer by question and answer form?

Mr. Blackwell:

Yes, sir.

The Court:

That is granted.

Thereupon: Maurice Fatio was called for examination in accordance with the foregoing ruling of the Court, and was examined and testified as follows:

Pages 550-555:

Mr. Lake:

If your Honor please, I object to the question on the ground that it is immaterial, irrelevant and incompetent, and it has no bearing on the issues involved in this case.

The Court:

He is making a record, Mr. Lake.

Mr. Lake:

I just want to reserve my exception.

* * * * * * *

The Witness:

I want to ask if my testimony here as a witness can be used as evidence in the case between Franklinville Realty Company and Treanor & Fatio.

The Court:

What case do you refer to?

The Witness:

I have been served with a paper to appear in a New York Court in a suit of Franklinville Realty Company against Treanor & Fatio in connection with the erection of this building.

The Court:

Do I understand correctly now that you, as a member of the firm of Treanor & Fatio—that is a partnership is it?

A. Yes, sir.

The Court:

And you have stated that in the State of Florida you have been served with process in a suit pending in the State of New York.

The Witness:

Yes, during my attendance on this Court here.

The Court:

In what Court is that suit pending; do you happen to know?

Mr. Williams (Attorney for defendant-owner):

In the United States District Court for the Southern District of New York.

The Court:

When were you served with papers in that suit?

A. I don't recall the date, but it was during one of the sessions here. I received a telegram from my partner, Mr. Treanor, stating that he had been served in New York.

The Court:

So you yourself were not served; in other words, your partner was served?

A. Yes, but as a partner I am a party to the suit.

The Court:

Have you employed counsel in that case?

A. I have.

The Court:

Is your counsel present here at this hearing?

A. No, sir.

The Court:

Is that Florida counsel or New York counsel?

A. New York counsel.

The Court:

Now, Mr. Fatio, do you claim the privilege of not answering questions which may be propounded to you by Mr.

Blackwell or his associates as counsel for the defendant because it may have some bearing on the pending litigation in the New York District Court?

A. That is what I mean, Judge.

The Court:

The question before the Court is ruling upon whether or not the witness will be allowed his privilege.

Mr. Blackwell:

I would like to ask a few questions of the witness at this point for the purpose of the record.

The Court:

All right.

Mr. Blackwell:

Mr. Fatio, isn't it a fact that you were in attendance upon this Court here in Miami under a subpoena served on you on behalf of the defendant before you received the telegram from New York advising you of the suit up there?

The Witness:

That is right.

Mr. Blackwell:

And the action in New York is a civil action?

The Witness:

Yes, sir.

Mr. Blackwell:

You don't contend that it is a criminal action of any kind instituted against you?

The Witness:

I don't know anything about it at all.

(Legal argument.)

The Court:

The Court has heard oral argument and concludes that the witness' attorney, who represents his partnership as an intervener in this case, should be given an opportunity to advise him on the question now before the Court, so action on the claim of privilege of the witness is reserved until tomorrow morning at 9:30.

Mr. Blackwell:

I now want to call Mr. Frederick G. Seelman.

Thereupon: Frederick G. Seelman was called to the stand and examined as follows:

Mr. Blackwell:

Q. Mr. Seelman, you have heretofore testified in this case that you were a member of the partnership of Treanor & Fatio, architects, at and during the time of the partial construction of the Franklinville Realty Company house at Palm Beach, Florida.

A. I have.

Q. And a member of the partnership of Treanor & Fatio that has intervened in this case to claim a lien against the property?

A. I am.

Mr. Blackwell:

Now the defendant, invoking again rule 43-B asks permission of the Court to call the witness who is now in the box as an unwilling and hostile witness and as an adverse party, for the purpose of cross-examination, with the right to impeach the witness or to contradict him under the terms of that rule.

Mr. Lake:

To which motion the plaintiff makes the same objection as heretofore interposed as to Mr. Fatio.

The Court:

The same ruling in the case of Mr. Fatio when he was tendered as a witness.

Mr. Blackwell:

In view of the Court's ruling, the defendant makes the same application as was made in regard to the testimony of Mr. Fatio, and asks leave to interrogate the witness by way of a proffer for the purpose of making a record under the provisions of Rule 43-C.

The Court:

That is granted.

Mr. Blackwell:

Q. Mr. Seelman, how long have you known Mr. R. B. Strassburger, president of the defendant corporation?

The Witness:

Your Honor, I don't want to answer these questions.

The Court:

You don't want to answer these questions?

The Witness:

No, sir.

The Court:

Because of what?

The Witness:

The same reason that Mr. Fatio gave.

The Court:

I make the same ruling. Action on it will be deferred until tomorrow morning at 9:30.

Pages 632-635:

Mr. Blackwell:

I now wish to call Mr. Fatio.

Mr. Baugher (Attorney for Treanor-Fatio-Seelman, intervening plaintiffs):

On behalf of this witness, it is my understanding that he has been called here as an adverse witness by the defendant Franklinville Realty Company in this case. I, as his attorney, object to his being called as an adverse witness in this cause on the theory that in the original trial he was called by the counsel who then represented the defendant, and at that time they admitted that he was not an adverse witness. I can quote briefly, if you wish, from the statements made by counsel who represented Franklinville Realty Company at that time before the Master.

The Court:

I have ruled that he was not an adverse witness, and that he is being called as their witness. When the Court ruled that he was not an adverse witness, Mr. Blackwell tendered him as an unwilling witness, and the subject matter of his proposed examination was made clear to the Court. I have forgotten just in what manner it developed, but it was not in connection with the matter that I am now trying between Arnold Construction Company and the Franklinville Realty Company, and upon the Court ruling that his examination would be immaterial Mr. Blackwell requested the Court to allow the interrogation to proceed by question and answer form, to develop the proffer, because he is making his record, including the excluded testimony, and it was during the proceedings when the witness was being questioned by question and answer form that the witness asked the Court as to whether or not answers he would make would be binding on the defendants in a lawsuit pending in the State of New York, in the Federal Court, and I understand there was developed with some definiteness the proceedings in which this partnership of Treanor & Fatio were parties, and then

in your absence (no one appearing here as counsel for him), we deferred it until today so that the Court could determine whether he should be interrogated over his objection, because of the possibility that what might be developed might be brought out to be material to the New York litigation.

Mr. Baugher:

Right on that theory, I object to the interrogation of the witness at this time because in the early history of the present case the partnership intervened in this case for the purpose of protecting their rights for some sum of money due them for services which they had rendered. Sometime subsequent to the intervention and the answer thereto about four attempts were made before this Court to file an amended answer or counterclaim. Each of these attempts was presented to the Court and the Court fully considered them, and the defendant was denied the requested amendments. That case now stands on the intervening petition and the original answer of Franklinville Realty Company. After that ruling, the defendant being unable to avail itself of some alleged claim that it had in this Court, and which had been ruled by this Court to be improper, he went to New York and filed a common law suit on substantially the same thing which had been denied by this Court. That case is pending up there in the New York Court, and to permit an interrogation of this witness before this Court in a case in which he is not concerned, might very well be prejudicial to the trial of that case up there.

The Court:

I have been quite interested in the matter presented. It involves a very interesting question as to the right of a witness who does not claim immunity because of any self-incrimination, the right of a witness to refuse to answer a question in litigation to which he is not a party. I do not think the right arises out of any constitutional provision, and so far as I know there is no statutory provision under the Florida Statute, and in the absence of a Federal Statute the Florida Statute would prevail, but it is a privilege asserted because of the partnership of which this witness is

a member, being a party defendant to other litigation. I think the asserted privilege is entirely sufficient to warrant, and I so hold that it is sufficient to withdraw the consent that was given to the attorney to interrogate the witness by question and answer form to develop his proffer. The defendant is allowed to make his proffer, if he so wishes, but the privilege is recognized by the Court and the witness will not be required to answer the questions under the circumstances herein disclosed.

Mr. Blackwell:

We have invoked Rule 43-B and have called this witness as an adverse witness and as an unwilling witness, and we have proposed to undertake to cross examine him and ask him leading questions, and subsequently to impeach him and contradict him if we have occasion to do so, and we renew that offer, renewing our offer to make the record on that basis. As I understand, your Honor has denied us that privilege.

The Court:

That is correct.

Mr. Blackwell:

So I do not understand that it is incumbent upon us to proceed further in view of this ruling.

The Court:

I understand that Mr. Seelman was on the stand yesterday and the same situation was asserted.

Mr. Baugher:

That is correct.

The Court:

I make the same ruling.

Mr. Blackwell:

We offer to interrogate this witness under the provisions of Rule 43-B as a hostile and adverse witness and as an

unwilling witness; we also propose to cross examine him concerning the subject matter of the litigation that is now before the Court, with the right to contradict him and impeach him pursuant to the rules, on the same basis as our proposal to cross examine and to likewise impeach the witness Fatio, and we ask the Court to rule upon our right to so proceed in view of this witness' claimed privilege.

The Court:

The proffer will be denied.

Pages 636-637:

The Court:

You may proceed.

Mr. Blackwell:

I wish to propound this question to Mr. Fatio. Mr. Fatio, the defendant has recalled you to the stand to propound to you another question, as follows: Do you claim or contend that any testimony that you might give in this case concerning architect's certificates or otherwise might tend to incriminate you?

The Court:

Do you care to answer that, Mr. Fatio?

Mr. Fatio:

I wouldn't know how to answer it.

The Court:

Do you understand what incriminate means?

Mr. Fatio:

No, sir.

The Court:

All right; I will let your attorney tell you in open Court what it means.

Mr. Baugher:

'Incriminate' means that it might possibly involve you in a criminal prosecution; that is, that your disclosure might be such that you could be charged with a crime.

Mr. Fatio:

I don't think it would incriminate me.

Mr. Blackwell:

That is all.

Pages 637-641:

Mr. Blackwell:

Call Mr. Seelman.

The Court:

Before Mr. Seelman is called I want the record unqualified and without any confusion to reflect the rulings of the Court. When Mr. Fatio was first offered as a witness by the defendant, the defendant called to the Court's attention Rule 43 of the Rules of Civil Procedure, Sub-section B, and claimed the right to examine Mr. Fatio as an adverse and unwilling witness. The Court then dealt with the question of adversity and held that there was, as to the matters now before the Court, no adversity between the claim of Treanor & Fatio and this inquiry. Treanor & Fatio are adverse to Franklinville Realty Company so far as their intervention is concerned, but they are not adverse in so far as the litigation between Franklinville Realty Company and Arnold Construction Company is concerned under this rule. The Court then held that, notwithstanding the lack of adversity, that the Court would recognize the statement made by defendant's counsel as to Mr. Fatio being an unwilling witness and incorporating that feature of tender and the Court held that the statement would be recognized and Mr. Fatio could be interrogated as an unwilling witness and therefore subject to leading questions. Thereafter the defendant declined to proceed with the witness thus tendered

without the right to impeach or contradict. The defendant then offered to examine Mr. Fatio under sub-section C of the same Rule 43, which section deals with a record being made of excluded evidence. In connection with the making of that record Mr. Blackwell, in response to a question by the Court, stated that he would like to develop the proposed tender of excluded evidence by question and answer form, and that was granted. The examination then proceeded, during which Mr. Fatio asked the Court as to whether his statements made in response to questions would be binding on parties in certain litigation now pending in New York State. That is the first information the Court had of any such litigation, and the witness was granted the right to have his counsel appear, and that matter was deferred, so far as the ruling was concerned, until the succeeding day, which was yesterday. On the claim being affirmatively made by the witness, through counsel, the Court, in the exercise of its discretion, revoked the privilege granted to the defendant to develop the proffered testimony or excluded evidence by question and answer form. My understanding of the record is that the witness has never been offered by the defendant, except as a hostile, unwilling and adverse party, and with the witness tendered thereafter as a hostile, unwilling and adverse party, the tender of the witness in that capacity was denied by the Court.

The defendant has the right, if he is not satisfied with the record as setting forth their tender of what the witness would state by their own statement, or what an excluded witness would testify to—they have the right to make that tender, but not by the development of the proffer by question and answer form. That is my recollection of the record, and it may not heretofore have been presented just in that form, where the whole matter is dealt with in one ruling of the Court. Those are my reasons, whether I am right or wrong.

Mr. Blackwell:

Are you ready for us to proceed now?

The Court:

Yes.

Mr. Blackwell:

Mr. Seelman, the defendant has called you to the witness stand to answer this question: You are asked to state whether or not you claim or contend that any testimony that you might give in this case concerning the architect's certificate or otherwise might tend to incriminate you.

Mr. Seelman:

I do not.

Mr. Blackwell:

You do not so contend?

Mr. Lake:

Do you make the same ruling, your Honor?

The Court:

Yes.

Mr. Baugher:

Are you through with this witness?

Mr. Williams:

For the present.

Mr. Baugher:

May I ask the Court, if they are finished with them, that they be excused. They were called here by the defendant and under their subpoena.

Mr. Blackwell:

We see no reason to keep them here further, your Honor.

The Court:

All right; they may be excused.

(7)

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Supreme Court Of The United States

OCTOBER TERM, 1942

No. 819

FRANKLINVILLE REALTY COMPANY, *Petitioner,*

—vs.—

ARNOLD CONSTRUCTION COMPANY.

ANSWER TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

BERT WINTERS,
PAUL W. POTTER,
Counsel for Respondent.

I.

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II.

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Supreme Court Of The United States

OCTOBER TERM, 1942

No. 819

FRANKLINVILLE REALTY COMPANY, *Petitioner,*

ARNOLD CONSTRUCTION COMPANY.

ANSWER TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

To the Honorable Harlan Fiske Stone, Chief Justice of the United States Supreme Court, and the Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

I.

INTRODUCTORY STATEMENT

This suit was filed in the State Court during 1937 for the foreclosure of a contractor's lien under an agreement whereby the owner agreed to pay all costs of the structure,

after the issuance of architect's certificates, plus a contractor's fee of $3,000.00 (R. 9-73). It was removed to the Federal District Court by Appellant, which, in its answer (R. 120-131) contended that, under its interpretation of the contract documents, it had overpaid the contractor. There were no allegations of fraud or bad faith on the part of the contractor.

The cause was referred to a master to hear the evidence and make findings (R. 173-174). He found for the contractor (R. 183-187). The District Judge, after argument, re-referred the case for additional findings (R. 1052-1054). The master again found for the contractor (R. 1089-1117), after which the District Judge again heard argument (R. 1126-1140) and entered a final judgment against the owner for a substantial portion, but not all, of the contractor's claim (R. 1141-1146).

An appeal was taken to the Circuit Court of Appeals which remanded the case for one purpose only—" * * * "for further proceedings limited to the presentation of evidence as to whether or not the labor and services listed in the certificates were actually used on the job, and whether or not the materials listed were actually used, or specially fabricated for use in the building." *(Franklinville Realty Company v. Arnold Construction Company,* 120 Fed. (2d) 144).

The District Judge appointed an Auditor who read the record of the former trial and sat with the trial judge during the taking of additional evidence, after which he filed his report in favor of the contractor (R. 2d, 661-672),

and the Court again entered judgment for said Appellee (R. 2nd, 683-691, 695-702).

During the course of the second trial, the Court did not restrict the Appellant-owner in the introduction of evidence concerning the contract and its performance by the contractor, but did refuse to permit said Appellant to examine, as adverse parties, the members of the architectural firm employed by said owner, since it appeared that a severance had been obtained, before the first trial, as to said architects' intervention (R. 180-181; R. 2nd, 545-547) and, at the time of said attempted examination, there was a suit pending in another Federal District Court, brought by said Appellant-owner against said architects for damages (R. 2nd, 550-555; 632-641). Appellant had insisted upon the right to examine said architects as adverse parties, without being bound by their testimony insofar as it related to the contractor's claim, and without showing that it would have any material bearing upon the contractor's suit, nor proffer as to what said owner expected to disclose by the testimony of said witnesses (R. 2nd, 638-640).

Without amending its pleadings, Appellant attempted to show, during the second trial, that the Appellee-contractor was guilty of fraud and bad faith, but, as heretofore stated, the trial judge, who, with the auditor, heard the evidence, entered a judgment for the contractor.

Upon a second appeal to the Circuit Court of Appeals, Fifth Circuit, the judgment was affrmed (R. 2nd, 715-717)

and petition for rehearing (R. 2nd, 719-725) denied (R. 2nd 726).

II.

ERRORS IN PETITIONER'S STATEMENT OF RECORD

Petitioner's statement of the case is hardly exact. The judgment of the District Court first appealed from was not "set aside" as recited (Petition p. 2) but was "remanded for further proceedinfs in conformity with this opinion." *(Franklinville Realty Company. v. Arnold Construction Company,* 120 Fed. (2d) 144.)

The original letter of the contractor dated March 19, 1937, did not propose to do the work "on a fair value basis" as stated by petitioner (Petition p. 3) but "for a total fee of three thousand dollars above all costs involved in construction of the project mentioned" (R. 921).

The record does not support the statement that the architects certificates were "improvidently issued." The requisitions and certificates were regularly issued and copies delivered to owner's representatives (R. 393-395).

It is true the District Court permitted the architects, Treanor and Fatio, to intervene (Petition p. 4), but petitioner fails to tell the Court that during the first trial and before the master made his findings, the District Court entered an order of severance as to the architect's (R. 180) and that during the trial no evidence was adduced before

the master with respect to the controversy between the owner and the architects (R. 186-187).

The petition also fails to state that the defendant cross-examined the witness Seelman during the first trial and had ample opportunity to develop any matter upon which he desired to question the witness (R. 424-430).

The petition also fails to state that during the course of the first trial the petitioner called witness Fatio as its witness and sought to examine him under the provision of Paragraph B of Rule 43 and that at said time counsel for the owner admitted that the witness was "not adverse at all as far as the plaintiff's case is concerned" but that in the interest of saving time and while the witness was there, he desired "to interrogate him to ascertain for our benefit, and for the benefit of this court, what records are in existence so as to lay the basis for the filing and serving of a notice to admit and produce certain documents in connection with the Treanor and Fatio intervention, as well as the Arnold Construction Company claim" (R. 523-527).

The petition also fails to state that the witness Fatio was recalled by the petitioner and testified during the course of the first trial (R. 805-810).

Examination of the entire record will disclose that the only witness during the first trial whose cross-examination was restricted by the ruling of the master that the architect's certificates are conclusive was witness J. Y. Arnold and that the Court, upon the second trial, permitted the further cross-examination of the witness by

the petitioner (R. 2nd, 39; 56-157; 164-211). The Court further stated that the ruling was not to interfere with the right of the defendant to go into the matter as combatting the prima facie effect of the architect's certificates (R. 2nd, 36-39).

III.

JURISDICTIONAL STATEMENT

The petition does not disclose any special or important reason for a review of the case by this Court or harmful error by the Trial Court.

IV.

ANSWER TO QUESTIONS PRESENTED BY PETITIONER

QUESTION ONE

The defendant was not denied due process by the District Court in denying his motion for leave to recall plaintiff's witnesses for further cross-examination. The only witness whose cross-examination was precluded by the ruling that the architect's certificates are conclusive was witness J. Y. Arnold, and the Court, upon the second trial, permitted further cross-examination of the witness by the petitioner (R. 2nd, 39; 56-157; 164-211). Full cross-examination of plaintiff's other witnesses was permitted at the first trial.

When a case has been decided on appeal and remanded to the trial court, the latter has no authority without leave of the appellate court to re-try the case or to enlarge the issues beyond the purpose for which it was remanded.

Sanford Fork & Tool Company, 160 U. S. 247; 40 L. Ed. 414;

City of Orlando v. Murphy (C. C. A. 5th 1938), 94 Fed. (2d) 426;

Seagraves v. Wallace (C. C. A. 5th), 69 Fed. (2d) 163; *Peavy-Byrnes Lumber Company v. Com'r Fifth Circuit*, 86 Fed. (2d) 234.

QUESTION TWO

The record does not disclose that the defendant was denied the privilege of proper cross-examination of any witness.

QUESTION THREE

Petitioner was not denied a substantial essential right by the refusal of the District Court to permit petitioner to interrogate the architects as adverse parties under Rule 43B of the Rules of Procedure. The Court granted the defendant the right to examine the witness Fatio as an unwilling or hostile witness by propounding leading questions to him (R. 2nd 545). The same is true as to witness Seelman (R. 2nd 554). The historic limitation upon

the scope of cross-examination to the subject matter of the direct examination was not changed by the new rules and is still observed in the Federal Courts. *Moyer v. Aetna Life Insurance Company*, 126 Fed. (2d) 141-143.

QUESTION FOUR

The rights of plaintiff existing by virtue of Rules 43B and 43C were not impaired by the Court's refusal to permit cross-examination of Fatio and Seelman. Fatio was never plaintiff's witness. Opportunity was afforded the defendant at the first trial to cross-examination witness Seelman (R. 424-430).

QUESTION FIVE

This question is based upon the false premise that the architect's certificates were impeached and discredited. The finding of the special master at the first trial, the judgment of the District Court, the judgment of the Circuit Court of Appeals on the first appeal, the judgment of the District Court on the second hearing, and the final judgment of the Circuit Court of Appeals on the second appeal are conclusive that the architects certificates were not impeached and discredited.

QUESTION SIX

Petitioner's sixth question is likewise based upon a false premise. The defendant was not precluded from showing that said certificates were improperly and collu-

sively issued (R. 2nd, 36 and 37), and no evidence was given of collusion between the contractor and the architects.

QUESTION SEVEN

This question is likewise based upon a false premise. The contract in question was not a 'reasonable cost and fair value" building contract but was one for a "fee of $3,000 above all costs involved in construction of the project mentioned." The architect's certificates were not given the "effect of controlling evidence" but were merely prima facie and the defendant was given ample opportunity in which to discredit and impeach the certificates.

QUESTIONS EIGHT, NINE, TEN AND ELEVEN

The Circuit Court of Appeals did not deny petitioner due process and equal protection of law by remanding the case to the District Court for "the presentation of evidence as to whether or not the labor and services listed in the certificates were actually used on the job." This suit is upon a written contract and not for quantum meruit.

The defendant was not denied due process of law by refusing to treat this case as one on quantum meruit. Findings in which a Federal District and Circuit Court of Appeals have concurred will be accepted by the Supreme Court where they are not shown to be erroneous or unsupported by evidence. *Virginian Railway Company v. System Federation No. 40, etc.*, 300 U. S. 515; 81 L. Fed. 789.

QUESTION TWELVE

The decisions of the Supreme Court for the State of Florida concerning the enforcement of the Florida Mechanics' Lien Act are not in conflict with the decision of the Circuit Court of Appeals in this case. In the case of *Langford v. Read*, 69 Fla. 198; 68 So. 723, the contractor was denied recovery on account of fraud in putting in a sham bid on the work performed by him. In *Alshire v. Palmer*, 119 Fla. 335; 161 So. 559, the evidence showed that the contractor had purposely padded material and labor accounts and therefore was denied recovery. In *Chapman v. St. Stephen's Protestant Episcopal Church and the Trustees of the Diocese of South Florida*, 10 So. (2d) 324, the record showed many items of labor and material claimed by the contractor were not furnished for the job and that the plaintiff failed to meet the burden of proof required of him.

V.

CONCLUSION

It is further respectfully submitted that plaintiff's petition should be denied.

Respectfully submitted,

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Counsel for Respondent.

(8)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 819

FRANKLINVILLE REALTY COMPANY,
Petitioner,

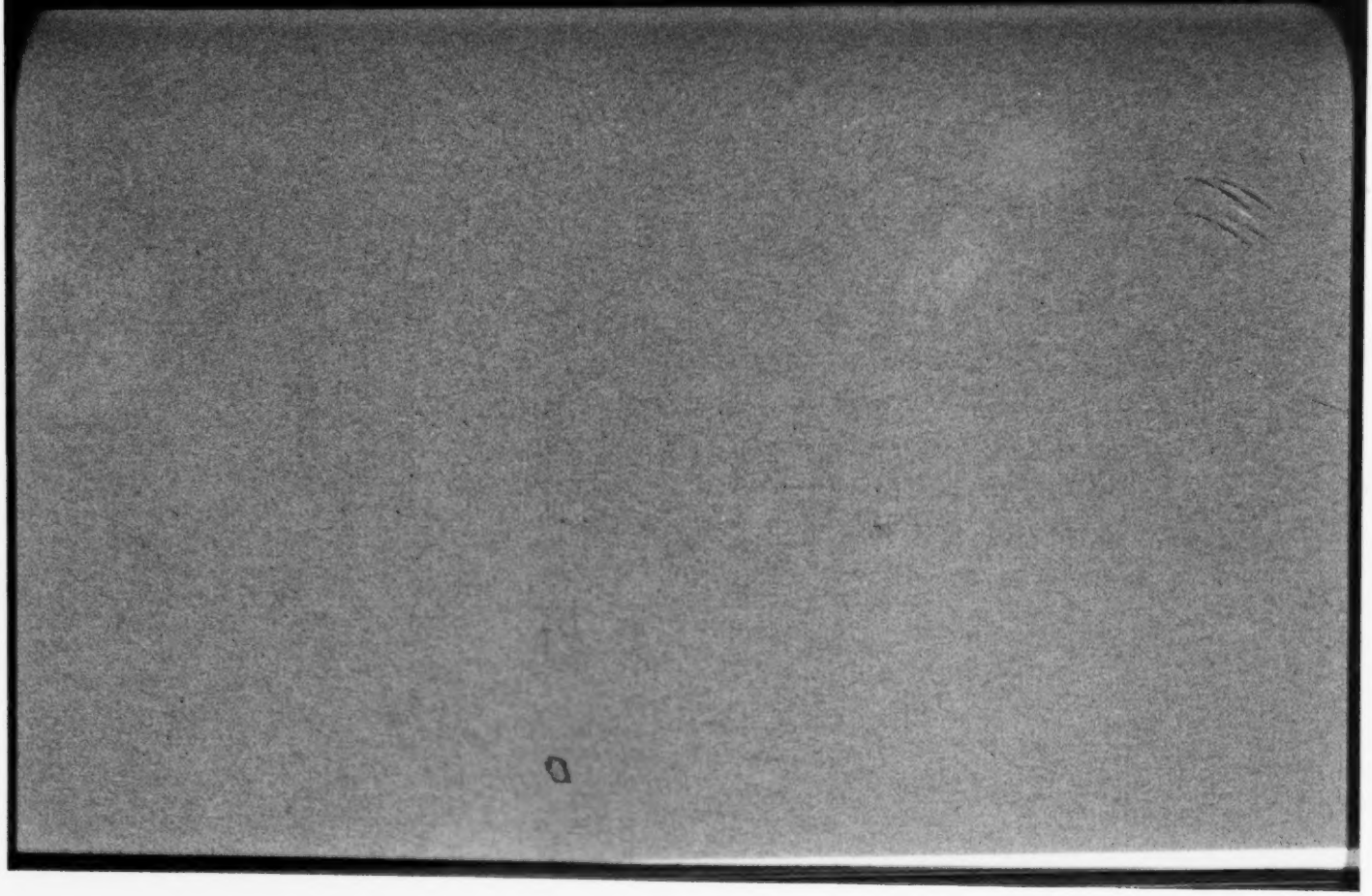
vs.

ARNOLD CONSTRUCTION COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

T. J. BLACKWELL,
Counsel for Petitioner.



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Memorandum Concerning Opinion of Lower Court.

Since the petition for writ of certiorari was filed herein, the opinion of the Circuit Court of Appeals for the Fifth Circuit in this case, No. 10455, has been published. It is contained in the Federal Reporter, Second Series, Advance Sheets for March 8, 1943, 132 F. 2d 828.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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FRANKLINVILLE REALTY COMPANY,
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REPLY BRIEF OF PETITIONER.

Preliminary Statement as to Alleged Errors in Petition.

The recitals contained in the petition for Writ of Certiorari herein have been re-examined, in view of the comments made in the Answer of the Respondent. We have found in the petition no inaccuracy or lack of exactness that seems to require explanation or amplification at this point.

The illusory nature of the purported errors in petitioner's statement and of the distinctions sought to be drawn in the answer will appear from the following:

Argument in Reply.

QUESTION ONE.

At the first trial, the Master, on defendant's motion, required the plaintiff to produce its records and cancelled

checks (R. 800-801). However, he almost immediately *reversed* that ruling. The Master stated that he would *"let the plaintiff stand on the architect's requisitions, in the absence of anything in the pleadings attacking these requisitions"* (R. 821).

Thereby, the defendant was deprived of a basis for an effective cross-examination of the plaintiff's witnesses and of the intervening plaintiffs, as witnesses, at the first trial. It is not correct to say that J. Y. Arnold was the only witness whose cross-examination was restricted.

At the second trial, the District Court did permit the defendant to recall (only) J. Y. Arnold for further cross-examination, and it was by such examination shown that he had directed charges against defendant, on plaintiff's books, of many thousands of dollars, for materials not known by him to have been used on the job.

If, at the second trial, defendant's motion to recall plaintiff's other witnesses had not been arbitrarily denied, cross-examination would have produced similar disclosures by them.

At the first trial the Master ruled that the architect's certificates were not subject to attack, and defendant was precluded from impeaching them. Clearly, the Master was wrong, for these reasons:

(1) This defendant's answer did set forth an affirmative defense of fraud (that has never been passed upon). It is therein averred (R. 123-124) that the charges represented by plaintiff's requisitions and architect's certificates thereon were *grossly excessive.* It is there further averred that the plaintiff is seeking to collect from defendant $25,-873.50, not due and owing.

(2) It is well settled that there need be no affirmative defense to attack architect's certificates which the contract does not make final or conclusive. Where the certificates

are not final or conclusive under the terms of the contract, they may be attacked under the defendant's general denial of the plaintiff's claim.

At the first trial, the issue as to fraud and collusion between the contractor and the architects was not tried and was not disposed of. The owner's evidence thereof was excluded.

If the Circuit Court of Appeals did dispose of the matter in the first appeal on the basis asserted by respondent in its brief herein, so that such question as to "collusion" and grossly excessive charges "was not open", then the said appellate court has denied petitioner due process in restricting the questions to be retried.

Question Two.

The record does disclose that the defendant was denied the privilege of proper cross-examination. It discloses that the District Judge believed that the question as to collusion "was not open" and ruled accordingly, throughout the second trial.

Question Three.

Fatio, intervening plaintiff, through the architect's certificates received in evidence, was a witness against defendant. As the certificates were not conclusive, he was subject to cross-examination concerning them.

The court did grant the defendant the right to examine Fatio, architect, as an unwilling or hostile witness, by propounding leading questions to him (R. 2d 545). The defendant then proceeded to so interrogate him and further objections were interposed. Those objections were sustained (R. 2d, 636-637), as is fully shown in the appendix to petitioner's main brief.

Question Four.

Seelman, architect, was an actual witness for the plaintiff at the first trial. He was also an adversary party in the case. After it was held, on the first appeal, that his certificates were not conclusive and the case remanded, he was subject to cross-examination by defendant as to the matter of collusion.

A wide latitude is permitted in seeking evidence of fraud, and it is especially true that extreme latitude should be permitted in the cross-examination of a party in regard to a fraud issue. *Volusia County Bank* v. *Bigelow,* 45 Fla. 638, 33 So. 704.

To permit a party to issue a certificate which is received in evidence against his adversary and then refuse to submit to cross-examination as to the subject-matter of the certificate, would seem to extend the idea of privilege to a point far beyond the remotest boundaries of that fair domain known as "due process of law".

Questions Five and Six.

It is not necessary to go beyond the report of the Auditor to ascertain that the architect's certificates were impeached and discredited.

Exhaustive studies of the unfinished structure had been made, to determine what the work done had amounted to, on a reasonable cost and fair value basis. The highest figure given by any witness in the case, as the maximum of such cost, was that of a highly qualified engineer, Phil J. Laurence. He testified, without cross-examination or contradiction, that the maximum was $34,256.00, and his figure was accepted by the Auditor in his report (R. 2d, 668).

The issuance of architect's certificates aggregating in amount $53,129.50 for work of a value, at the utmost, of $34,256.00, under the circumstances of this case, was most cogent evidence of fraud. There was much evidence of

fraud otherwise. All such evidence was *disregarded,* for the reason stated by the District Judge, and therein due process of law was denied petitioner, as defendant.

Questions Seven to Eleven

The building contract itself provided that defendant would reimburse the contractor for (only) costs necessarily incurred for the proper prosecution of the work, at rates not higher than the standard paid in the locality (R. 28). (See, also, averments of Bill of Complaint, R. 12.)

The contract also provided (Article 3) that the contractor must recognize the relation of trust and confidence established thereby between himself and the owner (R. 27).

Aside from the impeached and discredited architect's certificates, there was no evidence in support of plaintiff's claim except by way of unsupported ex parte book entries, and unauthenticated invoices. The charges, reflected by the book entries, were conclusively shown to have been authorized and made by parties not professing to have knowledge that labor and material charged for had been used, or was intended for, petitioner's house.

Question Twelve.

It has always been the law of Florida that a lien claimant, coming into a court of equity for foreclosure, must come with clean hands. The courts of Florida have also held, invariably, that when such a claimant presented an exorbitant and unconscionable demand, he should be denied relief. The mechanic's lien statutes of Florida have been so interpreted, especially in cases, such as the one at bar, involving a "cost plus" contract, where there is a fiduciary relationship between the contractor and the owner. But the Circuit Court of Appeals for the Fifth Circuit lost sight of the foregoing and applied the statute in a manner contrary to the Florida decisions.

Conclusion.

In conclusion, we respectfully submit that the record discloses fully and inescapably that at the first trial in the District Court, it was erroneously held that the architect's certificates were conclusive and not subject to impeachment for fraud or error; that the appellate court ordered reversal, holding that such certificates were not final and conclusive, but in no way disposed of the question as to fraud and collusion between the architects and the contractor; that at the second trial, the District Court declined to consider the evidence of fraud and collusion between the architects and the contractor, erroneously declaring that that issue had been disposed of on the first appeal; that on the second appeal, the appellate court flatly abdicated its function and declined to appropriately review the judgment below, thereby sanctioning and perpetuating the lower court's denial of due process. Further, petitioner was denied the right to appropriately cross-examine its opponent's witnesses and the adverse parties.

The extreme extent to which the lower courts have departed from the essential requirements of due process of law is accentuated by the answer of the respondent herein; not by way of what opposing counsel have said therein on behalf of respondent, but by reason of their total and unavoidable failure to explain or justify the actions of the lower courts, such actions being fundamentally and hopelessly at variance with constitutional principles.

Respectfully submitted,

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(9)

FILED
APR 30 1943
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CLERK

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PETITION FOR REHEARING.

T. J. BLACKWELL,
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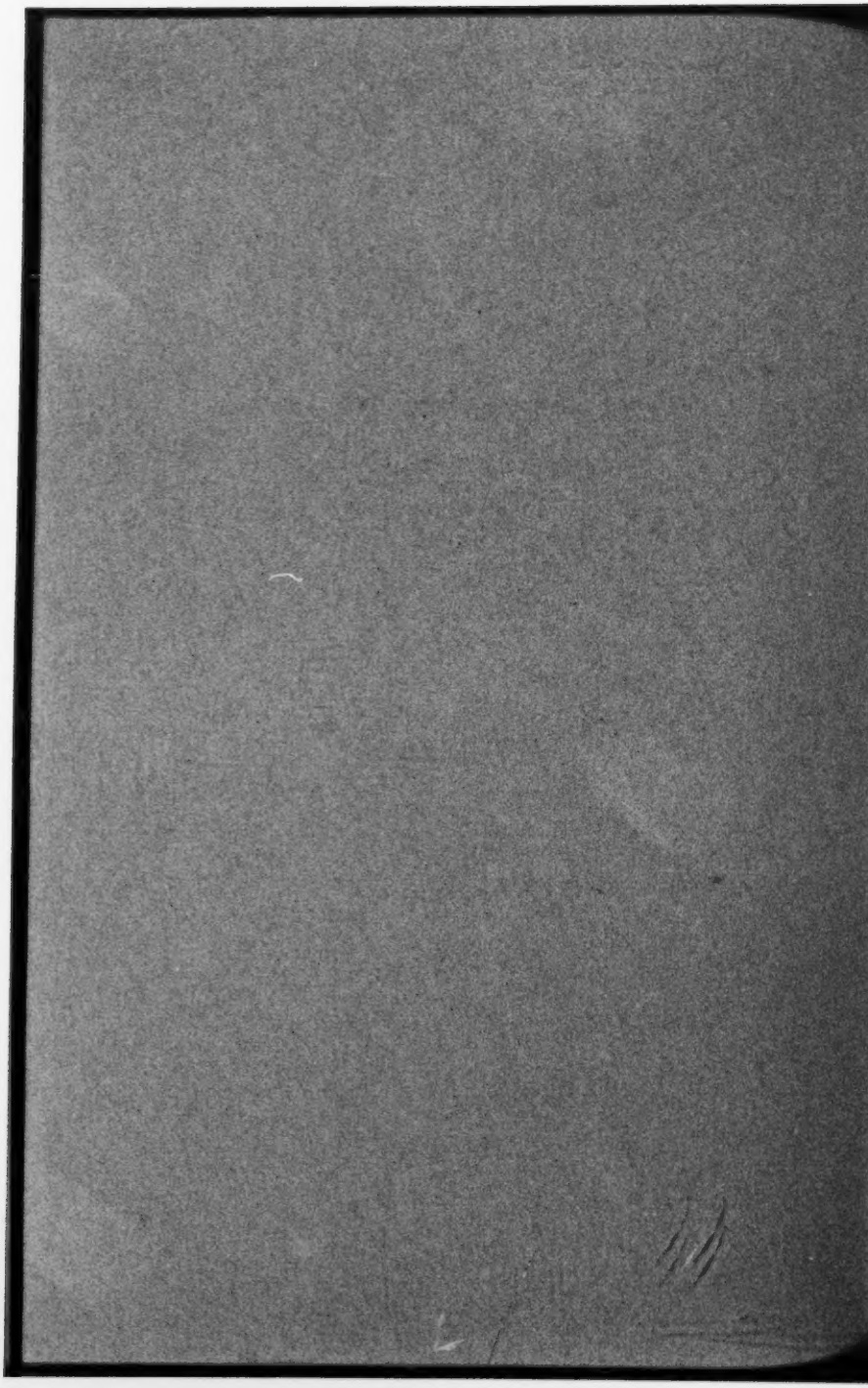

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 819

FRANKLINVILLE REALTY COMPANY,
Petitioner,

vs.

ARNOLD CONSTRUCTION COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

Comes now the above named Petitioner, Franklinville Realty Company, and presents this its petition for a rehearing of the above entitled cause, and in support of its application for rehearing respectfully shows:

One of the principal questions involved is as to whether the petitioner has been accorded due process of law in the lower courts in disposing of a question as to whether fraudulent and collusive practices were indulged in between the architects and contractor.

On page 4 of the petition for writ of certiorari herein, it is shown that the District Judge, at the conclusion of the case (R. 2d, 687) ruled as follows:

> "I realize that defendant contends there was a lack of good faith on the part of Arnold Construction Company in the carrying out of the contract, and that the securing of the approval of work done through the issuance of architect's certificates was a *collusive proceeding* between Arnold Construction Company and the architect, but I think all of that has been decided by the Court of Appeals, *is not an open question,* and the District Court should not now go back through the contract and relitigate the alleged lack of good faith, and *retry* this issue. The District Court should consider whether the defendant has upset on this re-reference or rehearing the prima facie effect of the architect's certificates."

The District Judge was mistaken in the foregoing, for the reason that the Circuit Court of Appeals had not passed upon the question as to collusion, that question not having been tried and being actually open for consideration, as the petition for writ of certiorari unquestionably discloses.

However, it is believed that this Honorable Court, in denying the application of the petitioner herein, possibly considered the case of *Chicago Life Insurance Co.* v. *Cherry,* 244 U. S. 25, 37 S. Ct. 494, 61 L. Ed. 966, as in point and controlling, as that case has been referred to by the text writers as holding that "an erroneous decision that the issue of jurisdiction has been judicially heard and determined in prior proceedings" was a mere error of law, not coming within the due process guaranty, whereas this Court, in that case, held only that the claim that a money judgment by a state court violates due process for want of jurisdiction over the defendant's person is not sustainable if the jurisdiction was questioned by the defendant under a plea in abatement and by appeal in the state courts of review, and

sustained after *fair* hearings before the judgment became finally effective.

A rendition of a judgment (in Illinois) in favor of the plaintiff in an action upon a judgment of a court of another state (Tennessee), over the defendant's objection that the judgment sued upon was void for lack of valid service of process does not take the property of the defendant without due process of law, where the second (Illinois) judgment rests upon the view, right or wrong, that inasmuch as the issue of jurisdiction over the parties *was actually raised and adjudicated* after full hearing in the former (Tennessee) case, it could not be reopened in the second (Illinois) action. It was so held in the *Cherry* case, supra, for the reason (1) that the determination by the courts of Tennessee on a factual basis, under the plea in abatement, that the defendant had been served or had submitted to the jurisdiction of the court could at most have been an "erroneous decision", and (2) the Illinois court was not required, in a collateral attack upon the judgment, to re-examine the question. That case is distinguishable from the case at bar for the reason that the Tennessee court *did grant a hearing* and did fairly decide the question upon the law and evidence, *even though its decision might have been incorrect,* and the Illinois court was not required to go behind the decision of the trial and appellate courts of Tennessee. But here, the issue was not tried and it is not even contended by the respondent that it has been tried. The court has expressly declined to try it, or to consider the evidence, mistakenly, as the record discloses, and as the adversary party admits.

Petitioner believes that the *Cherry* case may be distinguished, further, from the case at bar on the basis that, there, an Illinois court was required to recognize the judgment of the Tennessee courts and to give it full faith and credit, under the Constitution, whereas in the case at bar no such situation exists.

Petitioner believes that the record clearly discloses not merely an erroneous decision of a court on matters within its jurisdiction, after the parties have been *fully* heard in the regular course of judicial proceedings, but a failure to hear and a refusal to decide. Petitioner believes that the District Court erroneously decided that the issue as to fraud and collusion had been disposed of at a prior hearing, when actually that issue had not been "fully heard in the regular course of judicial proceedings" and had, in fact, not been heard at all.

Having in mind that the determination of the question as to whether the requirements of the due process clause have been observed, regard must be had for substance rather than form; and also believing the effect of the guaranty to be the inhibition of the taking of one person's property and giving it to another, in a way or through means contrary to settled usages and modes of procedure; and assuming that the clause here under consideration is designed to afford the litigant an opportunity to know opposing evidence and to meet it with evidence according to the principles of fair judicial investigation, and to have the final determination granted on evidence and some reasonable view supporting it, petitioner humbly suggests that this Honorable Court has overlooked its ruling and decision in the case of *Georgia R. & Electric Co.* v. *Decatur,* 295 U. S. 165, 55 S. Ct. 701, 79 L. Ed. 1365, *holding that a refusal to consider competent evidence is not mere error of law, but a denial of a full hearing under the constitutional guaranty,* and has inadvertently applied the rule that even an erroneous decision of a court on matters within its jurisdiction does not deprive the successful party of his rights under the guaranty, where the parties have been *fully heard* in the *regular course* of judicial proceedings.

On the basis above stated, this case may be readily distinguished from such cases as *Roberts* v. *City of New*

York, 295 U. S. 264, 55 S. Ct. 689, 79 L. Ed. 1429, holding that the due process clause is not a guaranty that a trial shall be free from error, but, to constitute a taking of property without due process of law by force of a judgment, the error must be gross and obvious, regardless of the classification or characterization of the error dealt with in the present case.

The respondent's objections to the petition herein seem to have been based principally upon the theory that the District Court, at the second trial, was strictly and narrowly limited in regard to the question to be determined and as to the evidence admissible. As to this, the answer to the petition (page 7) contains the following:

> "When a case has been decided on appeal and remanded to the trial court, the latter has no authority without leave of the appellate court to retry the case or to enlarge the issues beyond the purpose for which it was remanded."

It seems to have been assumed that the Circuit Court of Appeals, in that behalf, necessarily observed the essential requirements of law, and that its judgment on the first appeal was entitled to verity. At least, it is suggested that inasmuch as the petitioner did not attack the judgment of the said appellate court by appeal or certiorari, any question as to whether the first judgment on appeal provided petitioner with due process of law was foreclosed. It is respectfully submitted, nevertheless, that the said judgment, remanding the cause to the District Court for further proceedings, was not a final judgment, and was not an adjudication, final in its nature, as to any matter distinct from the general subject of the litigation. Therefore, it is mentioned that the jurisdiction of this Court has been sought at the earliest time possible, for the purpose of obtaining a review not only of the judgment rendered by the Circuit Court of

Appeals on the second appeal, but also for the review of the judgment of that court on the first appeal. The two appellate judgments last mentioned are so related to each other as to be inseparable for review purposes.

For the foregoing reasons, the petitioner urges that the principal question ought to be reconsidered, and for the same reasons the questions numbered 1 to 4, inclusive, as set forth in the petition for writ of certiorari (pages 7 and 8) should also be reconsidered.

It is submitted that the Court may take judicial notice of the fact that at this time there is in progress an enormous amount of public construction work under so-called cost plus contracts. The question as to the extent to which contractees under such agreements may be required to respond to exorbitant and fraudulent demands is one of gravity and importance, which may be influenced by a decision of this case by this Court. In addition, important questions are presented as to the construction of the Rules of Civil Procedure in regard to the cross-examination of adverse parties and hostile witnesses that ought to be settled.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the application for a writ of certiorari directed to the United States Circuit Court of Appeals for the Fifth Circuit, in the above entitled cause, be, upon further consideration, granted as petitioned for.

Respectfully submitted,

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Certificate of Counsel.

I, T. J. Blackwell, counsel for the above named petitioner, hereby certify that the foregoing petition for rehearing is being filed in good faith, and not for purpose of delay.

T. J. BLACKWELL,
Counsel for Petitioner.

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